SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 372

ABERT HERMAN NELSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. The opinion of the Circuit Court was rendered June 30th, 1944.

Jurisdiction.

The judgment of the Circuit Court of Appeals affirming the conviction of the petitioner was entered July 31st, 1944. The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Has any Selective Service System Board or official any authority whatsoever to pass upon any religious question, such as whether a person is a minister of religion or not?

2. Was it proven upon the trial of the defendant, beyond a doubt, that he was duly and properly notified to report?

3. Does the mailing of a notice under section 633, Point I of the Selective Service Regulations constitute due process of law under which defendant can be deprived of his liberties?

Statute Involved.

Section 11 of the Selective Training and Service Act of 1940 so far as pertinent, provides

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in the District Court of the United States having jurisdiction thereof be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *."

Statement.

The defendant was convicted, before the United States District Court, Western District of New York of a violation of the Selective Training and Service Act of 1940. The specific charge was that he failed to report to his local board as ordered. The present appeal is from that conviction. The defendant is a "regular minister of religion", of the sect known as Jehovah's Witnesses, within the meaning of Section 622.44, Subd. (B) of the Selective Service Regulations. As such minister he was entitled to be placed in class

IV-D, and was exempt from service of any kind. The local Selective Service Board attempted to determine whether he was a "regular minister" or not. This board decided that he was not a "regular minister" and put him in a class other than IV-D, and thereby made him liable for service. Under this conviction the defendant was sentenced to serve a term in Federal Prison.

The defendant appealed from this conviction and the conviction was affirmed by the United States Circuit Court of Appeals, Second Circuit on June 30th, 1944.

Specification of Errors to Be Urged.

The District Court erred:

1. In holding that a Selective Service System Board had authority to pass upon the appellant's claim to be a minister of religion.

2. The District Court erred in holding that the appellant questioned the correctness of the board's classification, when in fact the appellant really challenged the authority of the board to make any classification.

3. The District Court erred in holding that the appellant had been properly notified to report.

Summary.

The court below erroneously held that the defendant was challenging the correctness of the decision of the Selective Service Board in failing to classify the appellant as a clergyman. This is not correct; the appellant challenged the authority of the Selective Service Board or any other board or official to decide a religious question or any question involving the religion or the religious beliefs or practices of the appellant.

The court below assumed that because the defendant did not question, upon the trial, the sufficiency of the notice sent to him that he was duly notified. This, however, is not the case. It was the duty of the Government first to give such notice to the defendant to report as constituted due process of law and second to prove beyond a reasonable doubt that this notice constituted due process of law in accordance with the Selective Service Regulations and the Statute.

Argument.

I.

No Selective Service System Board, or Any Other Official Has Any Right to Decide Whether a Registrant Is or Is Not a Regular Minister of Religion.

We have apparently three conflicting decisions by the United States Supreme Court concerning the main question in this case.

1. In the matter of *Nick Falbo* against *the United States of America*, reported at 320 U. S. 549, the court apparently held that not only had a Selective Service Board the right to decide a religious matter, to wit, whether the appellant was a minister of religion, but also held that the courts had no right to review said determination of a board.

2. In the case of *The West Virginia State Board of Education* against *Barnette*, reported at 319 U. S. 624, the court held in effect that no board or official had a right to pass upon a matter involving religious opinions, which of course includes the opinion as to who is or is not a minister of religion. The court said in part as follows:

"The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities

and *officials* and to establish them as legal principles *to be applied by the courts.*

"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The above decision was rendered in 1943, during the present war. The United States Supreme Court at that time was well aware of the Selective Training and Service Act of 1940. It held, nevertheless, that it knew of no circumstances which permitted an exception to the above rule.

It is perfectly clear, from the above decision, that no person, other than the courts had any right to pass upon the claim of the defendant to be a minister of religion and therefore exempt from all service. Until the courts had passed on, and denied that claim, the Selective Service System Board had no authority to order him to report. On this point alone, the conviction must be reversed.

3. In the case of *The United States of America* against *Ballard*, reported at 64 Supreme Court Reporter, Page 882, the Supreme Court held in effect that no court had any right to pass upon the truth or falsity of the religious beliefs of any sect. The court held in effect "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. When the triers of fact undertake that task, they enter forbidden domain." Of course, one of the most important points of any religious sect is the question as to who is or is not a priest or a minister of that sect. It is the individual right of each person to regard whom he pleases as his clergyman or his priest. When the court attempts to pass on the question

as to who is a clergyman or a priest it attempts to substitute its judgment for that of the individual. This may not be done in The United States of America.

II.

It Was Not Proved beyond a Reasonable Doubt, That Defendant Was Legally and Properly Notified to Report to the Local Board.

The Selective Service Regulations, Section 633.1, provides that a notice to report shall be mailed at least ten days before the date set for induction. They also provide, Section 641.3, that the mailing of any order to a registrant shall constitute notice to him of the contents of the communication, "Where He Actually Receives It or Not."

In the present case, it was not proved, beyond a reasonable doubt, that notice was mailed to defendant in accordance with the Selective Service Regulations. No argument is necessary on this point. A mere casual examination of the record fails to show that the notice to report was mailed "by enclosing a true copy thereof in a securely sealed post-paid wrapper addressed as follows:

——, N. Y. which said address was the last known address of defendant, and by depositing the same in the Post Office Box regularly maintained by the United States Government at the corner of —— and —— Streets in the City of ——, New York on — day of ——, 194—."

The above requirements for serving any notice by mail are familiar to any law clerk. They are printed on the inside of any legal document cover. Yet in this case, there is not the slightest proof that they were in any way complied with. If these requirements must be met in a mere civil action, how much more necessary it is that they be followed in a criminal action.

The fifth amendment to the Constitution of the United States provides that "No person shall be * * * deprived of life, liberty, or property without due process of law; * * *."

In the present case regulation No. 641.3 of the Selective Service Regulations does not even pretend to be due process of law. It provides that the mere mailing of a notice to a registrant shall constitute notice to him of the contents of the communication, Whether He Actually Receives It or Not.

Under this section the defendant could have called, we may suppose, the United States postman as a witness. The postman could have testified, we may further suppose, that he had deliberately opened the envelope and had noted the contents thereof and thereupon destroyed the contents thereof and had failed to deliver it to the registrant. Notwithstanding this proof, under the words of the regulation, the defendant would have been guilty of failing to report. This regulation places the registrant at the mercy of every enemy he has. Any person at his home or elsewhere may seize the notice to report and destroy it before he receives it.

The notice may be lost through accident. Even so, under the regulation he is guilty of a crime in failing to report, even though he can establish beyond any doubt that he never received the notice and knew nothing of his obligation to report. This regulation is not merely illegal; it is positively vicious. It does not constitute due process of law in any sense of the word. When a man is inducted into the army he loses a certain amount of his liberty. He is not free as other men are to go and come when he wishes; to go where he wishes; or to work or not as he desires. He is deprived of freedom of motion and action. In order to deprive him of even this amount of liberty, it must be done by due process of law. By no step of imagination has due

process of law established by a mere presumption that a man knows what a mailed communication contains "Whether He Receives It or Not."

Conclusion.

For the reasons stated, it is respectfully urged that the prayer of the petition should be granted and that the decision of the Circuit Court of Appeals for the Second Circuit, referred to, should be reversed by this Court, under writ of certiorari.

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ABERT HERMAN NELSON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner was indicted on July 20, 1943, in the United States District Court for the Western District of New York for knowingly, unlawfully, and wilfully failing and neglecting to report on March 11, 1943, for a final type physical examination as directed by his local draft board, in violation of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 301, *et seq.*) (R. 4–5).

At petitioner's jury trial, the Government's proof showed that he had registered with his local draft board on October 6, 1940 (R. 12), and that

on July 2, 1941, he filed his questionnaire (R. 13), in which he stated that he had been employed for the past ten years as a salaried upholsterer (R. 31) and in which he claimed exemption from service under the Act as a minister of religion (R. 17). He was at first classified I–H (over 28 years of age) (R. 14, 18), and on January 28, 1942, was reclassified I–A (available for military service) by his local board (R. 14, 18, 22); upon appeal from the latter classification he was classified IV–E (conscientious objector to both combatant and noncombatant military service) (R. 15, 18, 22). In October 1942 petitioner's IV–E classification was resubmitted to the appeal board at his request and it was reaffirmed (R. 19, 20, 22). On February 26, 1943, the local draft board mailed to petitioner an order to report on March 11, 1943 for a final-type physical examination (R. 15, 22). Petitioner, as he admits (R. 25), failed to appear for that examination (R. 15), and a delinquency notice was mailed to him on March 11, 1943 (R. 15). Thereafter, on March 16, 1943, he appeared at the local draft board and stated orally and in writing that he would not comply with the Board's order since it was "contrary to his religion" (R. 16–17).

At the trial petitioner, in addition to admitting that he received the order to report for the physical examination, also admitted that he did not obey the order and that he informed the draft

board that he did not intend to obey it (R. 25). He also testified that he was a regularly ordained minister, having been ordained in October 1938; that he practiced his profession (R. 24); and that he had made no claim to classification as a conscientious objector (R. 24–25). The trial court, upon objection by government counsel, excluded testimony offered by petitioner calculated to show that he was a minister of religion (R. 26–30), and instructed the jury that the question of petitioner's status as a minister was not before it (R. 30).

Petitioner was convicted (R. 34) and sentenced to imprisonment for three and one-half years (R. 34). Upon appeal, the conviction was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 39–41).

Although petitioner claims that he is a minister of religion, he does not directly challenge in this Court the correctness of his selective service classification. Instead, he makes the broader contention that the Selective Service System lacked power to pass on his claim for exemption from service under the Act as a minister, apparently on the theory that it involves a matter of religion and that under the decisions of this Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, and *United States* v. *Ballard*, 322 U. S. 78, such matters, at least, are constitutionally beyond the purview of administrative officials. (Pet. 3–6, 11–14.)

However, it is settled that exemption from military service is a matter of legislative discretion rather than constitutional mandate. *United States* v. *Macintosh,* 283 U. S. 605, 622; *Hamilton* v. *Regents,* 293 U. S. 245, 263–264; *Rase* v. *United States,* 129 F. (2d) 204, 210 (C. C. A. 6). Consequently, it is plain that no constitutional barrier exists in respect of delegating the fact-finding function with reference to a registrant's ministerial status to the Selective Service boards. And, as recognized in the *Falbo* decision, 320 U. S. 549, 552, Section 10 (a) (2) of the Selective Training and Service Act has appropriately delegated that function to such boards. There is no constitutional question of religious freedom involved here, and, of course, the *Ballard* and *Barnette* decisions were not concerned with the Selective Training and Service Act. Hence, it is clear that there is not, as petitioner asserts (Pet. 4–5, 12–14), a conflict between the decision in the *Falbo* case and the decisions in the *Ballard* and *Barnette* cases. Under the *Falbo* decision the sole issue at petitioner's trial was whether he knowingly failed to comply with the order of his board, and on that issue the government's proof was conclusive.

Petitioner is mistaken in his further contention (Pet. 14–16) that "it was not proved, beyond a reasonable doubt, that notice [to report for a final type physical examination] was mailed to defendant in accordance with the Selective Serv-

ice Regulations," and in his reliance on Selective Service Regulation 633.1 (6 F. R. 6849) as the controlling regulation. That Regulation applies only to an order to report for induction; the order with which petitioner failed to comply was one directing him to report for a final type physical examination, and was issued under Regulation 651.2 (8 F. R. 78),[1] requiring that the registrant shall be notified on a specified form, and that the time fixed for reporting shall be at least ten days after the date the order was mailed. As we have shown, *supra,* p. 2, the order in petitioner's case was issued on February 26, and he was directed to report on March 11. On cross-examination at his trial petitioner admitted that he received the order (R. 25). In these circumstances petitioner's argument is plainly without merit. Moreover, since it appears that petitioner had actual knowledge of the order to report, there is no occasion for determining in this case whether, as petitioner contends (Pet. 14–16), Selective Service Regulation 641.3 (6 F. R. 6851), which provides that "The mailing of any order * * * by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not," is

[1] That regulation was deleted from the Selective Service Regulations in the course of a substantial revision of the Selective Service procedure in January 1944.

violative of the due process clause of the Constitution. Cf. *Lehon* v. *City of Atlanta,* 242 U. S. 53, 56.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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